Supreme Court, U.S.
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No. 87-287

In The
Supreme Court of the United States
October Term, 1987

—o—

STEPHEN R. REED,

Petitioner,

v.

JACK R. KARPER,

Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

—o—

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COUNTER-STATEMENT OF THE CASE

The case *sub judice* arises out of highly publicized public comments and written statements made by Petitioner Reed relating to alleged criminal conduct of Respondent Karper during the time period between November 5 and November 10, 1981, including a Petition filed by Reed in the Court of Common Pleas of Dauphin County seeking to enjoin alleged criminal conduct on the part of Karper, copies of which Petition were then publicly distributed and commented on by Reed (R. 127a, 711a-724a).

The initial press conference was convened by Reed on November 5, 1981, at a time when he was the unofficial and uncertified winner of a municipal election for the office of Mayor of the City of Harrisburg (R. 87a, 106a-109a). At that time, Reed called for an investigation of the City's Public Works Department where Karper served as Deputy Director and was charged with the management of the municipal steam-generating plant, more commonly known as the "incinerator" (R. 107a, 301a, 711a-716a). At that press conference, Reed released a letter sent by him to the District Attorney of Dauphin County and a captain of the Pennsylvania State Police, in which he alleged that certain officials within the Public Works Department may have taken kickbacks in exchange for contracts with that Department and might have benefited from bidding and non-bidding arrangements in the capacity as a "silent partner" of a local construction company (R. 107a-108a). In addition, Reed contended that City-owned equipment and personnel within the Public Works Department had been utilized for private and non-municipal purposes and that "ghost" employees were hired and payrolls padded

and that bids for municipal contracts were rigged on direct orders from administrative personnel within the Department of Public Works (R. 108a-109a, 711a-716a).

Reed further alleged that suspicious fires had occurred at several municipal facilities accompanied by the filing of false reports with the municipal police department and fraudulent claims which were allegedly sent to insurance companies which provided coverage for these facilities (R. 110a, 711a-716a).

Finally, Reed charged that an attempt was made to bribe the city policeman who was investigating the alleged arson and that it was possible that an arson ring may exist within the Public Works Department (R. 110a, 711a-716a). The above statements appeared in the November 4, 1981 edition of the Harrisburg *The Patriot* newspaper as well as on local television stations in Harrisburg and Lancaster (R. 711a-716a).

The press conferences were convened by Reed and the letters sent by him to the District Attorney and State Police captain were passed out to the media at Reed's direction (R. 113a-116a).

On November 6, 1981, Reed filed a Petition for a Preliminary Injunction with the Court of Common Pleas of Dauphin County alleging *inter alia* that Karper was removing municipal records from the incinerator facility on November 5, 1981, in conjunction with his daughter and an unidentified third person for the purpose of concealing and destroying the same and withholding them from the possession of the City of Harrisburg and that these records were essential to the investigation of cor-

ruption within the Department of Public Works (R. 254a, 725a-735a).

Based on the allegations contained in the aforesaid petition, a preliminary injunction was granted against Karper and others through an *ex parte* order by the Honorable John C. Dowling (R. 254a, 725a-727a).

Immediately following the issuance of the *ex parte* preliminary injunction, Reed again held a press conference in which he stated the purpose of seeking the injunction was to "freeze and protect these records which were extremely important to City government and that these records, which involve payroll, contracts and bidding information, should remain intact for any investigation conducted into the previously-cited criminal activities", and that "Karper is the motivating factor in why we done what we have" (R. 120a, 121a, 123a-126a, 717a-718a).

At the same time, however, Reed went on to say that he didn't know the exact nature of the files which were allegedly being removed by the Plaintiff and his daughter, but that Karper was still acting as superintendent of the incinerator plant and that it "seems suspect" that he would have so hastily removed his personal belongings (R. 124a, 717a-718a).

Reed concluded that the major reason he made the announcement was to make it more difficult for anyone to destroy records and to indicate that "we're interested in receiving information about such misconduct" (R. 124a, 125a, 717a-718a).

Reed's comments, as aforesaid, were published in the Saturday, November 7th edition of the Harrisburg *The Patriot* newspaper (R. 119a-120a, 717a-718a).

At the hearing held before the Honorable John C. Dowling for issuance of a preliminary injunction on Monday, November 9, 1981, Ricky Snyder, on whose affidavit Reed had based his petition, testified that he had seen two women moving boxes from Volkswagen automobiles into Karper's vehicle, but that he had not seen Karper at the scene, nor had he viewed him moving any boxes (R. 403a-404a).

Snyder went on to testify that "I told Mr. Reed that three cars were involved and the unidentified woman, and that's in fact what I said to him", and denied telling Reed that Karper was moving files (R. 404a). "If I had seen Jack Karper I would have said Jack Karper". (R. 405a).

Reed admitted at the preliminary injunction hearing that he had only one conversation with Snyder in the two years preceding that hearing (R. 417a).

Reed admitted that he had no personal knowledge as to what, if any, records were allegedly removed by Karper and that he had drafted the affidavit which was subsequently executed the following day by Snyder (R. 417a-418a).

The following testimony was given by Reed at the preliminary injunction hearing relating to his recollection of what he categorized as a "20-minutes conversation" which led him to draft the Snyder affidavit, and was read into the record in the trial of the case *sub judice*:

> "All three people whose cars were involved were also involved in the removal of files. It is entirely possible that was my misimpression and that's the way it was written . . . My primary questioning with Mr. Snyder over the telephone was over the content of the boxes since that is the essence of this entire proceeding, in my judgment anyway." (R. 418a-419a).

In response to the following question by Karper's counsel, "You went ahead and signed an affidavit to the petition setting forth that Respondent Karper, meaning Jack Karper, removed City records from the Vehicle Maintenance Center, did you not?", Reed replied, "We can certainly amend that, as apparently counsel had suggested prior to this hearing. I wasn't present for that prehearing conference." (R. 419a).

It should be noted that the affidavit drafted by Reed for execution by Snyder did not refer to any of the items allegedly being removed by Karper or the two women as either belonging to the City of Harrisburg or containing any identification relating to the same (R. 734a-735a).

Joseph K. Pierce, Esquire, who represented Reed in the equity action against Karper, testified on the morning of and preceding the preliminary injunction hearing on November 9, 1981, he had advised Reed that Snyder had notified him [Pierce] that there was a discrepancy in his affidavit with regard to the presence of Karper when material was allegedly being carried out of the building (R. 625a-626a).

Pierce testified that prior to drafting the preliminary injunction complaint, Reed had advised him that he had information from reliable sources *other* than Snyder about records being removed and on that basis he had formed the belief that in fact City records were being removed to keep them from the possession of the municipality (R. 629a-631a).

Although Reed testified at the trial in the lower court that he had received telephone calls from two individuals

prior to his conversation with Snyder indicating that records were being removed from the vehicle maintenance center, he did not know who they were and, in fact, could no longer recall their names (R. 439a-631a).

Reed subsequently referred to these two alleged telephone informants as being "eye-witnesses" whose "statements" were the basis for executing the affidavit required to file the petition for the preliminary injunction and allegation that "records" were being removed, but later modified his testimony to the effect that these witnesses never stated that records were being removed, but rather "suggested" the same (R. 459a-463a).

Reed later characterized the alleged phone calls from the two unidentified persons "as being worthless as far as testimony is concerned" and testified that he relied only on Snyder's statement (R. 523a-524a).

Insofar as Reed's allegations at press conferences relating to alleged criminal activity of the Department of Public Works, including arson, theft, use of public equipment for private use, payroll padding, etc., he stated that any information he had received with reference to these allegations was of no better quality than that which he received from Snyder (R. 511a-512a).

Despite his characterization of his conversation with Snyder and the two unidentified callers, Reed signed an affidavit in support of this petition for the preliminary injunction which set forth that he had "reliable information that City *employees* (emphasis added) saw records, documents, papers, contracts, bids, filings, etc. being removed from the custody, control and ownership of the

City for the sole purpose of having these records permanently destroyed, hidden or otherwise removed from the City's custody, control and ownership" (R. 727a-735a).

The affidavit that Reed formulated for execution by Snyder did not contain any reference to "City files" (R. 476a, 477a, 734a-735a).

Reed testified that he relied on the advice of counsel (Joseph K. Pierce, Esquire and William R. Balaban, Esquire) in filing the petition for preliminary injunction, but that Mr. Balaban stated he never thought Reed had much of a chance at prevailing in that action (R. 516a-517a).

Prior to the preliminary injunction hearing, Reed informed news reporters from the Harrisburg *Evening News* that he was seeking the injunction to put the "fear of God" into those individuals who might remove official records—"it happened so often and can happen so easily". (R. 162a, 723a).

Subsequent to Judge Dowling's dismissal of said petition, Reed informed the media that he did what he "believed necessary" after receiving reports that records were being removed and that while the injunction was not granted "we have sent a clear message" that actions in Harrisburg City Hall during the next two months, until he was to take office, would be carefully reviewed (R. 134a, 721a-722a).

Reed further admitted that he had, on several occasions prior to November 5, 1981, made allegations of criminal misconduct relating to Karper to the Pennsylvania State Police (R. 466a).

Reed acknowledged that his allegations that Karper removed municipal records could be a violation of the Pennsylvania Crimes Code and that certainly the destruction or removal or tampering or misuse of public records, as set forth in his petition for a preliminary injunction, was a violation of the Pennsylvania Criminal Codes. (R. 464a-465a).

Despite Petitioner's reference in its Statement of the Case to federal grand jury investigations and allegations of illegal bid procedures by Respondent, no testimony was produced at the trial of this cause linking Respondent to any improper, let alone, illegal activities and the City Controller, a member of Petitioner's political party testified that he approved all invoices in question.

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REASONS FOR DENYING THE WRIT

I. The State Court Decision Below is in Conformity with Applicable Decisions of this Court.

A petitioner, not content with a thrice told tale, now seeks yet another review by this Court of a determination made by three state courts that the question of petitioner's actual malice was appropriately submitted to a jury for its determination.

This Court in what must have been a prescient vision of petitioner's position in the case *sub judice*, held in *St. Amant v. Thompson*, 390 U.S. 727,

> the defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was

> indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is a product of his imagination, or is based wholly on an unverified anonymous telephone call.

Id. at 732.

Petitioner now challenges the findings of these three courts that there was constitutionally sufficient evidence establishing actual malice with regard to his published statements to submit the same to a jury and contends that based exclusively upon his self-contradictory testimony (which was rebutted not only by his purported affiant, Snyder, but by his own attorney, Pierce), a verdict should have been directed in his favor.

The trial court appropriately held:

> There was ample evidence about the defendant's conduct and about the pertinent circumstances prior to and at the time that the alleged defamatory statements were made from which the jury could well determine Mr. Reed's intentions and could assess the knowledge that he had. There being evidence from which the jury could determine that Mr. Reed acted with malice, and considering that the court charged the jury on this issue satisfactory to Mr. Reed, the issue was properly for the jury.

Petition for a Writ of Certiorari, p. 17a.

The Superior Court of the Commonwealth of Pennsylvania noted:

> The record contains a statement by Snyder that he did not see Karper moving records and that if he had seen Jack Karper, 'he would have said Jack Karper'. Reed, in turn, admitted that Snyder was the only one upon whom he relied stating that until his conversation with

> Snyder 'there was nothing really to go on'. Further, despite the lack of specific information from Snyder, Reed stated in his sworn court petition that the removed material included contracts, bids and filings.
>
> Our careful review of the record leads us to conclude that Reed acted with at least reckless disregard of falsity and with actual malice as to the allegations against Karper. We conclude that the evidence met constitutional standards and is clear and convincing.

Petition for Writ of Certiorari, pp. 9a, 10a.

Neither the trial court nor the Superior Court delegated its constitutional responsibility for independent review of the evidence to the triers of fact, but specifically found the evidence to be legally sufficient to withstand a motion for a directed verdict.

Petitioner confuses the trial court's obligation to determine whether there is clear and convincing evidence of "actual malice" as the same has been defined by this Court prior to submitting the case to a jury with some illusory duty to first specify the same in written form before allowing the jury to deliberate this issue. There simply is no authority for this novel proposition nor does Petitioner endeavor to conjure the same.

The Supreme Court of Pennsylvania in *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971) held that the trial court must "review the evidence adduced to determine its sufficiency to warrant submission of the case to the jury without impairing the Defendant's constitutional rights." *Id.* at 911-12.

What Petitioner seeks in actuality is to have this Court eviscerate the role of a jury by reassessing the credibility

of witnesses who testified at trial, and in so doing, misreads this Court's holding in *Bose Corp. v. Consumers Union of United States,* 104 S.Ct. 1949 (1984).

This Court stated: "We have repeatedly held that the Rule means what it says . . . It surely does not stretch the language of the Rule to characterize an inquiry into what a person knew at a given point in time as a question 'fact'." *Id.* at p. 1958.

In footnote 15, which immediately follows the above quote, the Court in *Bose, supra,* at p. 1958, states: "Indeed, in *Herbert v. Lando,* 441 U.S. 1953 . . . we referred in passing to actual malice as 'ultimate fact'."

In *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971), this Court held that interpreting the standard of malice in a case involving a public figure *and* a media defendant:

> That standard requires only that the plaintiff prove knowing or reckless falsity. That burden, and no more, is the plaintiff's whether 'public official', 'public figure' or 'little man'. It may be that jury instructions that are couched only in terms of knowing or reckless falsity, and omit reference to 'actual malice' would further a proper application in the *New York Times* standard to the evidence.

Id. at 52.

Although Reed is clearly a non-media defendant he has nevertheless been afforded on three occasions an independent examination of the evidence on the question of actual malice and there is more than clear and convincing evidence of the same. *Time, Inc. v. Pape,* 401 U.S. 279 (1971).

It is Petitioner's own testimony which establishes the clear and convincing evidence of "actual malice" and

deprives him under even the most stringent review of the right to be awarded a directed verdict.

Reed, despite admitting to Snyder's inability to describe what documents he saw in Karper's car on that fateful day (let alone Karper's presence at that time), nonetheless executed an affidavit stating that the same contained "contracts, bids, or filings" which he alleged were being removed by respondent with the intent to destroy them and keep them from the City's custody.

This conscious distortion of a conversation with a casual acquaintance does not constitute "one of the number of possible rational interpretations" of an event "that bristled with ambiguities and descriptive challenges for the writer" as in *Bose, supra,* at p. 1966 nor are Petitioner's totally groundless allegations of criminal conduct by Respondent worthy of being given constitutional "breathing space". *Id.* at 1966.

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CONCLUSION

For all of the foregoing reasons, the judgment of the Supreme Court of Pennsylvania should not be reviewed by this Court and Petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

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